

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Fones4All Corp. Emergency Petition for
Interim Waiver of Section 51.319(d) of the
Commission's Rules in the State of California

WC Docket No. 06-____

Petition for Expedited Forbearance Under 47
U.S.C. § 160(c) for Imposition of Additional
Unbundling Obligations

WC Docket No. 05-261

Unbundled Access to Network Elements

WC Docket No. 04-313

Review of the Section 251 Unbundling
Obligations of Incumbent Local Exchange
Carriers

CC Docket No. 01-338

OPPOSITION OF VERIZON¹ TO EMERGENCY PETITION FOR INTERIM WAIVER

Fones4All has shown no cause for the Commission to waive the date it established in the *Triennial Review Remand Order*² — March 11, 2006 — by which carriers “must transition the[ir] [embedded base of] mass market local circuit switching UNEs to alternative facilities or arrangements.” *TRRO* ¶ 227. In that order, the Commission found that carriers are not impaired nationwide without unbundled mass-market circuit switching and specifically rejected claims — including those of Fones4All — that carriers “are impaired in specific circumstances due to unique characteristics of the particular customer[s] . . . they seek to serve.” *Id.* ¶¶ 204-205, 222.

¹ The Verizon telephone companies (“Verizon”) are identified in Appendix A to these comments.

² Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”), *petitions for review pending*, *Covad Communications Co. v. FCC*, Nos. 05-1095 *et al.* (D.C. Cir.).

The Commission, moreover, held that it would refuse to order unbundling even if “any potential impairment . . . may still exist,” because “the disincentives to investment posed by the availability of unbundled switching” and of UNE-P “justify a nationwide bar on such unbundling.” *Id.* ¶ 204. Nonetheless, the Commission gave carriers 12 months — double the amount it had proposed in the *Interim Rules Order*³ — to transition their embedded base of UNE-P arrangements to lawful, alternatives, and at only \$1 greater than the TELRIC rate. *See TRRO* ¶¶ 227-228. In light of the Commission’s findings and its already overly generous 12-month period, Fones4All’s petition provides no basis on which the Commission can compel incumbents in California to continue providing Fones4All with UNE-P arrangements for any additional period beyond March 10, 2006, much less for four or seven months thereafter.⁴

First, Fones4All claims that its pending forbearance petition provides grounds for an interim waiver of the March 11, 2006 deadline. *See* Waiver Pet. at 3-5. As Verizon has explained,⁵ that forbearance petition rests on a fundamental — and incurable — legal error. A grant of forbearance from 47 C.F.R. § 51.319(d), which states that incumbents are “not required” to provide UNE mass-market circuit switching, would not and *could not* create an obligation on incumbents to continue providing UNE-P arrangements for a carrier’s “embedded base” or for new arrangements. That is because, as the Supreme Court and the D.C. Circuit have made clear, incumbents have *no* obligation to provide UNEs under § 251(c)(3) unless and until the

³ Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, ¶ 29 (2004), *petitions for review dismissed as moot, United States Telecom Ass’n v. FCC*, Nos. 04-1320 & 05-1062 (D.C. Cir. June 1, 2005).

⁴ As Fones4All notes, the statutory deadline for ruling on its petition is July 1, 2006, but could be extended to September 29, 2006. *See* Waiver Pet. at 3 & n.5.

⁵ *See* Opposition of Verizon to Petition for Expedited Forbearance at 1-2, 3-6, WC Docket No. 05-261 (FCC filed Oct. 14, 2005) (“Verizon Opp.”).

Commission both makes a finding of impairment pursuant to § 251(d)(2) and determines that unbundling is warranted as a response, in light of the “costs of unbundling (such as discouragement of investment in innovation).”⁶ As a result, with respect to elements for which the Commission “withhold[s] unbundling orders” — such as mass-market circuit switching — there is no regulatory requirement that the Commission could forbear from enforcing, because forbearance “obviously comes into play only for requirements that exist” in the first place. *USTA II*, 359 F.3d at 579-80.

Because a grant of its forbearance petition would not include the determinations under § 251(d)(2) necessary for the relief that Fones4All seeks — the indefinite perpetuation of its embedded base of UNE-P arrangements and, presumably, the right to order new UNE-P arrangements — the pendency of that petition provides no lawful grounds for granting an interim waiver of the March 11, 2006 deadline. Indeed, such a waiver would be the equivalent of imposing unbundling requirements without a finding of impairment — which the Supreme Court and D.C. Circuit have held, in no uncertain terms, is unlawful.

In addition, as Verizon has demonstrated, Fones4All’s forbearance petition necessarily fails for reasons beyond that basic legal error.⁷ In particular, the petition (at 7-8) makes clear that Fones4All’s grievance is actually with the manner in which CLECs are reimbursed from state and federal universal service funds. Whatever the merit of these claims, the D.C. Circuit

⁶ *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 571-72, 574 (D.C. Cir.) (“*USTA II*”), *cert denied*, 543 U.S. 925 (2004); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390-92 (1999) (finding that Congress did not intend to authorize “blanket” and “unrestricted” access to UNEs and that the 1996 Act does not establish an “underlying duty to make all network elements available”; instead, the Commission must “determine on a rational basis *which* network elements must be made available,” applying the standards that are prescribed by the Act); *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (“*USTA I*”) (holding that Congress “made ‘impairment’ the touchstone” for any requirement that incumbents provide UNEs).

⁷ *See Verizon Opp.* at 8-13.

has held that the Commission must address any such issue directly, and cannot order unbundling where there exists a “narrower alternative” with “fewer disadvantages.” *USTA II*, 359 F.3d at 570-71. Following that holding, the Commission likewise recognized in the *TRRO* that “neither the impairment inquiry nor the other aspects of the unbundling framework should be distorted to compensate for alleged failings in related but distinct areas of the Commission’s regulatory regime.” *TRRO* ¶ 23.

Second, Fones4All claims that alleged actions by SBC California (now AT&T California) justify an interim waiver of the March 11, 2006 deadline throughout California. *See* Waiver Pet. at 5-6 & Chesnosky Decl. ¶¶ 4-10, 17. Verizon presumes that AT&T California will respond to Fones4All’s specific allegations. However, Fones4All’s own submission makes no mention of *any* steps it took to transition its embedded base of UNE-P arrangements in AT&T California’s territory until *eight-and-a-half months* after the release of the *TRRO* and until the 12-month period was more than halfway over. *See* Chesnosky Decl. ¶ 6. Fones4All offers no explanation for its delay in complying with its obligation under the *TRRO* to “transition [its embedded base of] mass market local circuit switching UNEs to alternative facilities or arrangements” by “the end of the twelve month period.” *TRRO* ¶ 227.

Verizon’s experience with Fones4All is similar. Following the effective date of the *TRRO* and the start of the 12-month period, Fones4All waited until October 2005 before taking any steps to negotiate a lawful alternative for its embedded base of UNE-P arrangements in Verizon’s territory. Other CLECs in Verizon’s territory in California, however, have successfully migrated their embedded base of UNE-P arrangements in advance of the March 11, 2006 deadline. Indeed, as of January 27, 2006, approximately 95 percent of the embedded base of UNE-P arrangements in Verizon’s territory in California had been transitioned to lawful,

alternative arrangements, leaving fewer than 13,000 UNE-P arrangements in place as of that date.⁸

Given Fones4All's own unexplained delays in fulfilling its responsibility to comply with the March 11, 2006 deadline, there is no possible basis for waiving that deadline in California and requiring Verizon or AT&T (or any other incumbent in California) to continue serving Fones4All's embedded base of arrangements at the TELRIC-plus-\$1 rate the Commission established in the *TRRO*.

For the foregoing reasons, the Commission should deny Fones4All's petition.

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Respectfully submitted,



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March 6, 2006

⁸ See Reply of Verizon California Inc. at 4, R.95-04-043, I.95-04-044 (Cal. PUC filed Feb. 14, 2006).

APPENDIX A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local telephone companies affiliated with

Verizon Communications Inc. These are:

Contel of the South, Inc., d/b/a Verizon Mid-States
GTE Southwest Incorporated, d/b/a Verizon Southwest
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on the 6th day of March 2006, I caused a copy of the foregoing Opposition of Verizon to Emergency Petition for Interim Waiver to be served upon the following party by first-class mail, postage prepaid.

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